No. 13,840

United States Court of Appeals

For the Ninth Circuit

CAPITOL CHEVROLET COMPANY, a corporation,

Appellant,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

JAMES A. KENYON, ADAMS SERVICE CO., a corporation, F. NORMAN PHELPS and ALICE PHELPS,

Appellants,

vs.

LAWRENCE WAREHOUSE COMPANY, a corporation,

Appellee.

BRIEF FOR APPELLANTS JAMES A. KENYON, ADAMS SERVICE CO., F. NORMAN PHELPS AND ALICE PHELPS.

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JURISDICTIONAL STATEMENT.

Civil Action No. 30,473 was commenced on April 12, 1951, by the Reconstruction Finance Corporation, an agency of the United States, in which the Government of the United States owns more than one half

of the capital stock, against Capitol Chevrolet Company, Lawrence Warehouse Company, James A. Kenyon, Capitol Chevrolet Co., V. J. McGrew and Seaboard Surety Company. More than $3,000 was involved in the controversy. The foregoing averments are contained in the complaint, Paragraphs I and II (R. 38-39 in 13840). The jurisdiction of the District Court of the complaint of Reconstruction Finance Corporation is founded on 28 United States Code, sections 1331, 1345 and 1349.

On June 6, 1951, Lawrence Warehouse Company filed its answer and cross-claims against Capitol Chevrolet Company, James A. Kenyon and Capitol Chevrolet Co. On February 15, 1952, Lawrence Warehouse Company amended its cross-claim to add as cross-defendants Adams Service Co., James A. Kenyon, F. Norman Phelps and Alice Phelps. The cross-claims of Lawrence Warehouse Company against James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are the cross-claims involved in this appeal. Said cross-claims were filed pursuant to Rule 13(g), Federal Rules of Civil Procedure, and arose out of the same transaction or occurrence, i.e., the rendition and judgment in favor of Defense Supplies Corporation against Lawrence Warehouse Company, Capitol Chevrolet Company and V. J. McGrew on or about April 15, 1946, that was the subject matter of the complaint of Reconstruction Finance Corporation and are ancillary to the complaint (Answer and Cross-claim of Lawrence, R. 56-57 in 13840).

Coastal Air Lines v. Dockery, 180 F. 2d 874 (8th Cir. 1950);

Lawrence v. Great Northern Ry. Co., 98 F. Supp. 746 (D.C. Minn. 1951);

United States Fidelity & Guaranty Co. v. Janich, 3 F.R.D. 16 at 19 (S.D. Cal. 1943).

The cross-claim of Lawrence Warehouse Company in Civil Action No. 23171 was consolidated for trial with its cross-claims in Civil Action No. 30473. The judgment in favor of Lawrence Warehouse Company in both actions was "entered" on February 12, 1953. On March 3, 1953, the court made its order and determination *nunc pro tunc* that there was no just reason for delay in entering the judgment in No. 30473 dated February 11, 1953, and ordered and directed the entry of said judgment (R. 179).

On March 10, 1953, James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps each severally filed their notices of appeal from the judgment in favor of Lawrence Warehouse Company on February 12, 1953 (R. 179 et seq. in 13840). Jurisdiction on this appeal is founded on 28 United States Code, Section 1291.

STATEMENT OF THE CASE.

The principal questions for decision in this case are:

1. Whether the District Court could ignore fundamental principles of due process of law to hold these appellants bound by evidence which was not offered and could not have been offered against them.

2. Whether the District Court could ignore the only evidence offered and the judicial admissions of

appellee and the prior judicial determination against appellee that appellee's negligence contributed to the loss for which it was awarded indemnification.

On April 12, 1951, Reconstruction Finance Corporation filed its complaint in Action No. 30473 against Capitol Chevrolet Company (hereinafter called "Capitol"), Lawrence Warehouse Company (hereinafter called "Lawrence"), James A. Kenyon, Capitol Chevrolet Co. (to be distinguished from Capitol Chevrolet Company), V. J. McGrew and Seaboard Surety Company, the surety on Lawrence's supersedeas bond in Action No. 23171. The Complaint in No. 30473 was based on a judgment in favor of Defense Supplies Corporation against Lawrence, Capitol and one V. J. McGrew rendered in Action No. 23171; James A. Kenyon and Capitol Chevrolet Co. were averred to be liable for the obligations of Capitol in this second action, No. 30473. Lawrence again cross-claimed against Capitol and against James A. Kenyon and Capitol Chevrolet Co. Capitol, James A. Kenyon and Capitol Chevrolet Co. denied liability on the complaint of Reconstruction Finance Corporation and on the cross-claims of Lawrence.

On March 7, 1951, H. C. Alphson, Esq., and Dempsey, Thayer, Deibert & Kumler, attorneys for James A. Kenyon and Capitol in Action No. 30473, were substituted as attorneys for Capitol in No. 23171 (R. 4 in 13840).

On November 20, 1951, the court granted summary judgment in favor of Reconstruction Finance Corporation in No. 30473 against Lawrence, Seaboard

Surety Company, V. J. McGrew and Capitol, jointly and severally, in the amount of the judgment in favor of Defense Supplies Corporation ($42,171.70) plus interest and costs (R. 81 et seq. in 13840). No determination has been made of the claims of Reconstruction Finance Corporation against James A. Kenyon and Capitol Chevrolet Co. It is contended on this appeal that this judgment in favor of Reconstruction Finance Corporation is not final (See Rule 54(b), F.R.C.P.).

On February 15, 1952, Lawrence filed an amendment to its cross-claim in No. 30473 naming as additional cross-defendants Adams Service Co., J. A. K. Co., F. Norman Phelps and Alice Phelps (R. 113 et seq. in 13840). F. Norman Phelps and Alice Phelps filed their answers to this cross-claim on March 5, 1952, and while it has been contended that Adams Service Co. was neither served nor appeared, the court held that Adams Service Co. appeared and defended on the merits (R. 134 et seq. in 13840). No question is raised on this issue on this appeal.

On March 4, 1952, on motion of Lawrence and in confirmation of a minute order entered on January 9, 1952, the court ordered that the "Above-captioned actions [No. 23171 and No. 30473] be consolidated for trial on March 5, 1952" (R. 18 in 13840). In their answers to the cross-claims of Lawrence, James A. Kenyon, F. Norman Phelps and Alice Phelps denied that judgment was rendered in favor of Defense Supplies Corporation against Lawrence, Capitol and V. J. McGrew because of the negligence

of Capitol and because of the failure of Capitol to perform its duties and obligations under the Agency Agreement dated October 1, 1942, under which Capitol had agreed to store tires and tubes for Lawrence (R. 99, 148 in 13840). As affirmative defenses these cross-defendants and appellants here pleaded that:

1. Lawrence was estopped by the judicial record, including Judgment, Findings of Fact and Conclusions of Law, in No. 23171 to deny that its active negligence was the cause or a contributing cause of the damage for which judgment was rendered in favor of Defense Supplies Corporation in No. 23171 (R. 102-103, 152 in 13840).

2. The independent active negligence of Lawrence caused or contributed to the cause of the damage for which judgment was rendered in favor of Defense Supplies Corporation in Action No. 23171 (R. 103, 152-153 in 13840).

3. Lawrence acquiesced in and consented to any negligence of Capitol, if any there were, which caused or contributed to the cause of the damage for which judgment was rendered in favor of Defense Supplies Corporation in Action No. 23171 (R. 103, 153 in 13840).

4. The cross-claim of Lawrence was barred by subsection (1) of Section 337 of the California Code of Civil Procedure and the claims therein set forth did not accrue within four years next before the commencement of the action (R. 101, 151 in 13840).

On this appeal it is urged that the court erred in finding as to these appellants that Capitol breached any duty to Lawrence and in failing to find in favor of the affirmative defenses.

For the purposes of this appeal, it is admitted that James A. Kenyon and Adams Service Co. assumed the liabilities of Capitol; it is also admitted for the purposes of this appeal that F. Norman Phelps and Alice Phelps are liable for the obligations of Adams Service Co. Inasmuch as the District Court held that Adams Service Co. appeared and defended on the merits although no pleadings were filed by it (R. 134 et seq. in 13840), those defenses and denials which were asserted by F. Norman Phelps and Alice Phelps are assumed to have been asserted by Adams Service Co.

On or before December 31, 1943, James A. Kenyon and Adams Service Co. assumed the liabilities of Capitol and acquired their interests in the assets of that company, which was dissolved on or before that date (R. 121; Ex. F, 357 in 13840). Thereafter the action by Defense Supplies Corporation against Capitol and Lawrence, Action No. 23171, was commenced, and the cross-claim of Lawrence against Capitol was filed (R. 3 in 13840). At the trial of the cross-claims against these appellants absolutely no evidence was introduced or admitted against these appellants to show that Capitol incurred any liability to Lawrence (R. 317, 322-323 in 13840). Counsel for Lawrence did not indicate in any way at the trial, nor

was it pleaded, that if as a result of the trial of the cross-claims a judgment was rendered in favor of Lawrence against Capitol in No. 23171, said judgment would be asserted as an estoppel against these appellants to prove that Capitol incurred a liability to Lawrence.* Apparently, however, this was the basis for the judgment in favor of Lawrence against these appellants (Order for Judgment, R. 29 in 13840). It is urged on this appeal that it was error to hold the judgment in No. 23171 to be an estoppel against these appellants because it was not offered against them, because it could not have been offered against them, these appellants not being in privity with Capitol and because it was not at the time of trial, and perhaps is not even now, a final judgment.

The District Court also held that James A. Kenyon and Adams Service Co. had actively participated in the defense of the action by Defense Supplies Corporation against Lawrence and Capitol and in the defense of Lawrence's cross-claim against Capitol (Finding, No. VIII, R. 121 in 13840). Lawrence did not plead or contend at any time during the trial of the cross-claims that these appellants participated in the trial of the complaint of Defense Supplies Corporation and absolutely no evidence was introduced in support of that finding. At the trial of the cross-claims no evidence of Capitol's liability to Lawrence was introduced, even in support of Lawrence's cross-claim in No. 23171, other than the evidence which had been

*The entire reporter's transcript of the trial of the cross-claims, including argument of counsel, is part of the transcript No. 13840.

introduced by Defense Supplies Corporation at the trial of its complaint against Lawrence and Capitol (R. 317 in 13840). Therefore it is urged on this appeal that the District Court erred in finding that these appellants participated in any trial in which evidence of Capitol's liability to Lawrence was adduced. Although Lawrence did not plead or indicate in any way at the trial that it would be contended that these appellants had defended and would be bound by the proceedings against Capitol, counsel for appellants specifically pointed out prior to the submission of the cause that no evidence had been, or could be, offered against appellants (R. 413-415 in 13840).

SPECIFICATION OF ERRORS.

1. The judgment against Capitol Chevrolet Company in No. 23171 must be reversed, thereby resulting in a reversal of the judgment against these appellants.

2. The Judgment and Findings of Fact (Findings, Nos. V, VI and VII, R. 119-121 in 13840) and the Conclusions of Law (Conclusions, Nos. I and II, R. 128-130 in 13840) are unsupported by the evidence in that absolutely no evidence was offered or admitted against these appellants showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company or caused any damage or loss to Lawrence Warehouse Company.

(a) The court erred in holding that the judgment to be rendered in favor of Lawrence Warehouse Company in No. 23171 was binding on these appellants.

(i) None of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are parties to the judgment in favor of Lawrence against Capitol, nor are they in privity with parties thereto nor did they aid or participate in, or have the right to control, the defense of the action in which that judgment was rendered.

(b) The court erred in holding that the judgment in favor of Lawrence Warehouse Company against Capitol Chevrolet Company in No. 23171 was binding upon the above-named appellants because said judgment was rendered subsequent to the trial of this action and said judgment may not even now be final.

3. The court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company, or was solely negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII and XXIII, R. 120-121, 125, 126, 127, 128 in 13840).

A. Lawrence Warehouse Company, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determination therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation.

B. Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store the tires and tubes of Defense Supplies Corporation in the Ice Palace knowing of its fire hazards and undertook to provide and did provide watchmen for the Ice Palace whose duty it was to protect the tires and tubes and who had actual knowledge of the acts of V. J. McGrew which caused the damage to the tires and tubes.

4. The court erred in failing to hold that the cross-claims of Lawrence Warehouse Company are barred by the statute of limitations (C.C.P. Sec. 337(1)).

5. The court erred in finding (Findings, No. X, R. 123 in 13840) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company, and in finding (Findings, No. XI, R. 123 in 13840) that on or about November 21, 1951, while said judgment was still in force and unsatisfied, cross-claimant Lawrence Warehouse Company paid plaintiff Reconstruction Finance Corporation the sum of $58,859.90 in full

satisfaction and discharge of said judgment in favor of said plaintiff.

6. For the foregoing reasons the court erred in granting judgment in favor of Lawrence Warehouse Company and in refusing to grant judgment in favor of appellants, and each of them.

SUMMARY OF ARGUMENT.

I. The judgment against Capitol Chevrolet Company in No. 23171 must be reversed, thereby resulting in a reversal of the judgment against these appellants.

II. The Judgment and Findings of Fact (Findings, Nos. V, VI and VII) and the Conclusions of Law (Conclusions, Nos. I and II) are unsupported by the evidence in that absolutely no evidence was offered or admitted against these appellants showing that Capitol Chevrolet Company breached any duty to Lawrence Warehouse Company, incurred any obligation to Lawrence Warehouse Company or caused any damage or loss to Lawrence Warehouse Company.

A. The court erred in holding that the judgment to be rendered in favor of Lawrence in No. 23171 was binding on these appellants.

1. None of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are parties to the judgment in favor of Lawrence against Capitol, nor are they in privity with parties thereto nor did they aid or par-

ticipate in, or have the right to control, the defense of the action in which that judgment was rendered.

B. The court erred in holding that the judgment in favor of Lawrence against Capitol in No. 23171 was binding upon the above-named appellants because said judgment was rendered subsequent to the trial of this action and said judgment may not even now be final.

C. Consolidation could not under the federal practice supply the deficiencies in proof of plaintiff's case against these appellants.

III. The court erred in failing to find that Lawrence Warehouse Company was equally, jointly and contributorily negligent or negligent in any of said ways with Capitol Chevrolet Company, or was soley negligent in causing the damage for which judgment was rendered in favor of Defense Supplies Corporation in Civil Action No. 23171, and in finding to the contrary (Findings, Nos. VI, VII, XIII, XVII, XVIII, XIX, XXII and XXIII).

A. Lawrence, having participated in the trial of the complaint of Defense Supplies Corporation in No. 23171, is bound by the determinations therein that its acts joined and concurred in causing the damage to the tires and tubes of Defense Supplies Corporation.

IV. Lawrence Warehouse Company expressly directed Capitol Chevrolet Company to store the tires

and tubes of Defense Supplies Corporation in the Ice Palace knowing of its fire hazards and undertook to provide and did provide watchmen for the Ice Palace whose duty it was to protect the tires and tubes and who had actual knowledge of the acts of V. J. McGrew which caused the damage to the tires and tubes.

V. The court erred in failing to hold that the cross-claims of Lawrence Warehouse Company are barred by the statute of limitations (C.C.P. Sec. 337(1)).

(If these appellants are in privity with Capitol so as to be bound by the proceedings against Capitol, then the commencement of the cross-claim against Capitol in No. 23171 caused the statute of limitations to run against any other action asserting the same claim. The cross-claims in No. 30473 were filed more than four years after the filing of the cross-claim against Capitol in No. 23171.)

VI. The court erred in finding (Findings, No. X) that on November 21, 1951, Reconstruction Finance Corporation recovered judgment against cross-claimant Lawrence Warehouse Company and cross-defendant Capitol Chevrolet Company, and in finding (Findings, No. XI) that on or about November 21, 1951, while said judgment was still in force and unsatisfied, cross-claimant Lawrence Warehouse Company paid plaintiff Reconstruction Finance Corporation the sum

of $58,859.90 in full satisfaction and discharge of said judgment in favor of said plaintiff.

(The judgment in favor of Reconstruction Finance Corporation is not final and is subject to revision at any time (Rule 54(b) F.R.C.P.)

ARGUMENT.

I. THE JUDGMENT AGAINST CAPITOL CHEVROLET COMPANY IN NO. 23171 MUST BE REVERSED, THEREBY RESULTING IN A REVERSAL OF THE JUDGMENT AGAINST THESE APPELLANTS.

At the trial of the cross-claim of Lawrence against appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps no evidence was introduced to show that Capitol incurred any liability to Lawrence. Although the Findings of Fact and Conclusions of Law made by the court after the trial of the cross-claims apparently relate to all the cross-defendants, it is clear that the only basis on which the court granted judgment against these appellants was the judgment against Capitol. The court stated in its Order For Judgment (R. 29 in 13840):

> "James A. Kenyon and Adams Service Co. having actively participated in the defense of Capitol Chevrolet Company in No. 23171, the judgment in that action is res judicata as to them. Inasmuch as they assumed the liabilities of Capitol Chevrolet Company upon its dissolution they are liable for the amount of the judgment against Capitol."

F. Norman Phelps and Alice Phelps were held liable as the alter ego of Adams Service Co. (Order Amending Order for Judgment, R. 30 et seq. in 13840). Thus, the reversal of the judgment in favor of Lawrence against Capitol must necessarily result in a reversal of the judgment against these appellants.

Butler v. Eaton, 141 U.S. 240 (1891).

II. THE JUDGMENT AND FINDINGS OF FACT (FINDINGS, NOS. V, VI AND VII) AND THE CONCLUSIONS OF LAW (CONCLUSIONS, NOS. I AND II) ARE UNSUPPORTED BY THE EVIDENCE IN THAT ABSOLUTELY NO EVIDENCE WAS OFFERED OR ADMITTED AGAINST THESE APPELLANTS SHOWING THAT CAPITOL CHEVROLET COMPANY BREACHED ANY DUTY TO LAWRENCE WAREHOUSE COMPANY, INCURRED ANY OBLIGATION TO LAWRENCE WAREHOUSE COMPANY OR CAUSED ANY DAMAGE OR LOSS TO LAWRENCE WAREHOUSE COMPANY.

In the cross-claim of Lawrence against these appellants it is alleged as follows:

"V.

> The said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant as principal for and because of the negligence of cross-defendant Capitol Chevrolet Company, the agent of cross-claimant, and for no other reason. Cross-claimant is entitled to recover any sums paid by it under said judgment from cross-defendant Capitol Chevrolet Company by virtue of the relationship existing between them * * *." (R. 57 in 13840.)

"III.

That said judgment in favor of said Defense Supplies Corporation was rendered against cross-claimant solely because of the failure on the part of cross-defendant Capitol Chevrolet Company to perform its duties and obligations under the said written contract between said cross-defendant and cross-claimant, and for no other reason * * *." (R. 60 in 13840.)

No evidence was introduced against these appellants to prove the above averments. The only evidence to prove Capitol's liability to Lawrence introduced at the trial of the cross-claims was the transcript of testimony and exhibits which had been adduced at the trial of the complaint of Defense Supplies Corporation. This evidence was introduced only on the cross-claim of Lawrence against Capitol in Action No. 23171, the first action. It was not offered against these appellants. The following statements of the court and counsel at the trial demonstrate this fact (R. 317 in 13840):

"Mr. Garrison [Counsel for Lawrence]. I move that the record of evidence, the transcript in 23171, be before Your Honor at this time in connection with the cross-claim that is a part of that proceeding, and that it be considered by Your Honor in connection with the issues which have not been litigated in that case on the cross-claim.

Mr. Archer [Counsel for appellants]. You are offering it only as to 23171?

Mr. Garrison. Yes."

The transcript states further (R. 322-323 in 13840):

"Mr. Archer. Now I wonder, to get back to the other question, if we are starting with the evidence. I think before the evidence is presented, if that is what you are doing, I have some documents—for instance, the Phelps' answers are not due until tomorrow. Two additional defendants were served in the other case, 30473. Their time——

The Court. Let's wait until we get to that case; counsel, I understand are offering it only in the one case.

Mr. Garrison. 23171.

Mr. Archer. Aren't we offering evidence in 30473?

Mr. Garrison. No, I am only offering——"

And, further (R. 339-340 in 13840):

"The Court. The cases have been consolidated, and I think that probably any evidence in one case could be considered in the other anyhow.

Mr. Garrison. I think so, but I want to make certain.

Mr. Clark. That is subject to the same reservation.

Mr. Garrison. That is it.

Mr. Archer. I think counsel has stated that he was offering evidence first in one case, and that is the way I understood it.

The Court. All right."

Before submission of the cause counsel for appellants pointed out that no evidence had been offered against appellants (R. 413-415 in 13840).

The court's opinion, previously quoted, indicates that as to these appellants the evidence which the court considered as proving that Capitol incurred some liability to Lawrence was the judgment rendered after the trial and at the same time and in the same document as the judgment against these appellants (Order for Judgment, R. 29 in 13840). Among the several insuperable objections to this procedure is the fundamental objection that this judgment was never offered in evidence by Lawrence. Preliminarily it should be pointed out that the Federal Rules require a party to plead a judgment if reliance is sought to be placed on it (Rule 9(e) F.R.C.P.). This Lawrence did not do.

Whatever may be the rule as to other matters of judicial notice, it is clear that a party relying on a judgment as an estoppel must particularly refer to that judgment in the course of the trial; this is especially true where the persons against whom the estoppel is asserted are not even parties of record to that judgment. In *Paridy v. Caterpillar Tractor Co.,* 48 F. 2d 166 (7th Cir. 1931), the court had before it an action arising out of the alleged fraud of defendants in obtaining confidential information of the plaintiff. The trial court had granted a motion to dismiss on the ground that a former judgment, against the plaintiff was a bar to the instant action. The trial court had taken judicial notice of the prior proceedings to grant the motion to dismiss a judgment for defendant. In reversing this judgment, Circuit Judge Sparks stated for the court (pp. 168-169):

"While a court will invariably take judicial knowledge of the facts which it has acquired at a prior hearing of a cause (Murphy v. Citizens' Bank, supra—and in that case it was the same cause which was referred to), only under exceptional circumstances will it notice proceedings in another cause, although tried in that court and between the same parties. 15 R.C.L. p. 1111, § 42, and cases heretofore cited. The exceptional cases referred to are such as a proceeding for contempt in violating a prior decree, or a proceeding in garnishment in aid of a prior judgment; but in none of the decisions above referred to were these exceptional cases before the court.

The reason for the rule above referred to is that the decision of a cause must depend upon the evidence introduced. If the courts should recognize judicially facts adjudicated in another case, it makes those facts, though unsupported by evidence in the case in hand, conclusive against the opposing party; while if they had been properly introduced they might have been met and overcome by him. So, on a plea of res adjudicata, a court cannot judicially notice that the matters in issue are the same as those in a former suit. Such matters must be pleaded and proved. 15 R.C.L. p. 1111, § 42."

This case was followed in *Johnston v. Ota,* 43 C.A. 2d 94, 110 P. 2d 507 (1941).

A case strikingly analogous to the instant case is *Dillard v. McKnight,* 34 C.2d 209, 209 P.2d 387 (1949). That was an action for damages for wrongful death resulting from an automobile collision

brought by the parents of the decedent. The decedent died as a result of the injuries sustained in a collision between a Pontiac and a Studebaker, the Studebaker being operated by one McKnight. The decedent was a passenger in the Pontiac. The instant action was commenced against McKnight and his employer, J. F. Wilcox; the owner of the Studebaker automobile, W. J. Neville; Thorley Oil Company, and several fictitiously named defendants. The cause went to trial as to certain defendants and at the conclusion thereof a motion for a nonsuit was granted as to Thorley Oil Company. Judgment was granted for the plaintiffs against defendants McKnight and Wilcox and in favor of the defendant Neville. The court found that at all times mentioned in the complaint McKnight was the agent, servant and employee of the other defendants and that he was acting within the scope of his employment. Execution on this judgment was returned unsatisfied. As a result of certain evidence adduced upon the 1942 trial, plaintiffs claimed to have learned for the first time the identity of James A. Bower and Robert A. Thorley who were, approximately four years subsequent to the trial, served with process as Doe defendants, the complaint being amended to show their true names. The cause thereupon went to trial for the second time before the same judge, the court finding that the negligence of McKnight caused the automobile collision, that McKnight was employed by Wilcox, Thorley and Bower, but that at the time of the collision McKnight was not acting within the scope of his employment. Ac-

cordingly, judgment in favor of defendants Bower and Thorley was thereupon entered and the plaintiffs appealed. The evidence showed that Wilcox, Thorley and Bower were partners in an oil drilling venture in which McKnight was employed as a driller. On appeal, the plaintiffs argued that the findings and the judgment in the first trial of the action were binding on Thorley and Bower. The court denied this contention on three grounds: (1) Thorley and Bower not being in privity with Wilcox, they were not bound by the prior judgment; (2) the plaintiffs had failed to prove that Bower and Thorley had controlled the conduct of the prior litigation, and (3) plaintiffs had waived any right they might have had to assert the binding effect of the first judgment. On this latter point, Justice Spence stated for a unanimous court (p. 218):

> "Nor does it avail plaintiffs to rely on the principle of judicial notice in support of their present plea of res judicata. While a trial court is bound to take judicial notice of its own records in the same action (20 Am.Jr., Evidence, § 86, p. 104; 10 Cal.Jr., Evidence, § 52, p. 728; *Craiglow v. Williams,* 45 Cal.App. 514, 516 [188 P.76]; *Schomer v. R. L. Craig Co.,* 137 Cal.App. 620, 627 [31 P.2d 396]; *Mason v. Drug, Inc.*, 31 Cal. App. 2d 697, 701 [88 P.2d 929]; *In re Reader,* 32 Cal.App.2d 309, 313 [89 P.2d 654]), and matters which are subject of judicial notice are not dependent upon either pleading or proof for their effectiveness in the determination of issues before the court (20 Am.Jr., Evidence, § 25, p. 54; 10 Cal. Jr., Evidence, § 25, p. 698; *Altoona Quicksilver*

Mining Co. v. Integral Quicksilver Mining Co., 114 Cal. 100, 103 [45 P. 1047]), the judgment entered against defendant Wilcox upon the conclusion of the first trial did not operate as a matter of law to conclude the rights of his co-partners, defendants Bower and Thorley. As so viewed, the situation here is akin to that existing when the former judgment, available in bar of the retrial of an issue, was entered not in the same, but in a different action, and proper evidence in proof of its effectiveness as a prior adjudication must be made in the trial of the subsequent action or the benefit will be held to have been waived. (50 C.J.S., Judgments, § 836, p. 404; see, also, *Johnston v. Ota,* 43 Cal.App.2d 94, 97 [110 P.2d 507].)"

The *Dillard* case is particularly pertinent because the court held that Thorley and Bower, admittedly liable for partnership obligations, were not bound by a prior judgment against one of the partners and that it was necessary for the plaintiffs to prove this obligation again as to them.

In *Wolfsen v. Hathaway,* 32 C. 2d 632, 638, 198 P.2d 1 (1948), the California Supreme Court held that a plaintiff waived its right to rely on a former judgment as an estoppel by failing to offer it in evidence.

In the case at bar counsel have searched in vain for any reference during the trial of the cross-claims, including argument of counsel, to the fact that Lawrence would rely on any judgment it might recover in the future against Capitol to prove its case. Due

process required that when cross-defendants terminated the presentation of evidence they were entitled to know the evidence that was to be used against them. It is not an answer to this argument to say that because the judgment had not yet been rendered, Lawrence could not have pleaded or proved it. Reliance on the judgment could have been pleaded, and due process would at least require some mention to have been made of the judgment during the presentation of Lawrence's case. In this regard it must be noted that Lawrence itself caused this predicament, for it was Lawrence who moved to consolidate for trial the cross-claims in No. 23171 and No. 30473 over the objections of counsel for cross-defendants (R. 210, 259, 321-322 in 13840). There is no injustice in holding Lawrence to the course of action which it voluntarily adopted. But to hold appellants bound by a judgment to which they are not parties, which was not pleaded nor proved against them, is to deny to appellants their day in court.

Furthermore the argument that by judicial notice the judgment to be rendered in No. 23171 establishes a liability of Capitol to Lawrence defeats itself. The court must also judicially notice that in the same judgment the cross-claim of Lawrence against Capitol in No. 30473 was dismissed (R. 133 in 13840). This operated as a dismissal on the merits (Rule 41(b), (c), F.R.C.P.). This judgment dismissing Lawrence's cross-claim against Capitol is a final judgment (R. 179 in 13840) from which no appeal has been taken, and as to which the time for appeal has passed. Thus by

judicial notice Lawrence is faced with a final judgment to which it is a party determining that Capitol is not liable to Lawrence.

A. THE COURT ERRED IN HOLDING THAT THE JUDGMENT TO BE RENDERED IN FAVOR OF LAWRENCE IN NO. 23171 WAS BINDING ON THESE APPELLANTS.

It has already been pointed out that the judgment to be rendered in favor of Lawrence against Capitol in No. 23171 was neither pleaded nor offered against these appellants. Assuming, arguendo, that said judgment had been pleaded and proved, and assuming that said judgment is not reversed, it nevertheless was error for the court to consider it to be binding on these appellants.

1. None of James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are parties to the judgment in favor of Lawrence against Capitol, nor are they in privity with parties thereto nor did they aid or participate in or have the right to control, the defense of the action in which that judgment was rendered.

As has been pointed out, these appellants were never made parties to either the claim or cross-claims in Civil Action No. 23171. They are not parties to the judgment in favor of Defense Supplies Corporation against Lawrence, Capitol and McGrew; nor are they parties to the judgment in favor of Reconstruction Finance Corporation against Capitol and Lawrence. At the trial of the complaint of Defense Supplies Corporation, Capitol was represented by A. J. Getz and Cameron B. Aikens (R. 60 in 11418). On March 7, 1951, long after all the evidence had been

adduced in the trial of the claim of Defense Supplies Corporation, Dempsey, Thayer, Deibert & Kumler were substituted as counsel for Capitol in No. 23171 (R. 4 in 13840). Even assuming that Dempsey, Thayer, Deibert & Kumler, also counsel for these appellants, conducted the defense of Capitol in No. 23171 from that day on, none of the evidence which it is now asserted shows that Capitol incurred some liability to Lawrence was adduced at any trial in which said counsel appeared. Lawrence relied solely and completely on evidence introduced at the trial of the complaint of Defense Supplies Corporation. Thus, assuming that these appellants controlled the defense of Capitol in No. 23171 from March 7, 1951, to the present time, these appellants had no opportunity to cross-examine any witnesses or object to any evidence upon which the judgment in favor of Lawrence against Capitol is founded.

The circumstances under which these appellants can be bound by the judgment in favor of Lawrence against Capitol are clear. In the case of *Hy-Lo Unit & Metal Products Co. v. Remote C. Mfg. Co.,* 83 F. 2d 345 (9th Cir. 1936), Circuit Judge Wilbur, speaking for the court, reviewed the applicable Supreme Court decisions on this subject and concluded as follows (p. 350):

> "These decisions by the Supreme Court establish the proposition that, in order for a person not formally made a party to a suit to be estopped by the decision therein, he must either be in privity with a party thereto in the strict sense

of the term or he must not only aid in the prosecution or defense of a suit, but have the right to participate and control such prosecution or defense. Neither in the supplemental bill or the affidavits are there any facts alleged showing a right of the appellee to participate in and conduct the defense of the action prosecuted by appellant against the Potter Radiator Corporation or any interest of appellee in the subject-matter of that suit. It was not alleged in the supplemental bill nor shown in the affidavits that appellee had agreed with the Potter Radiator Corporation to participate and exercise joint control over the defense of the individual suit prosecuted by the appellant against that company or had agreed with appellant to be bound by the judgment in that suit. Consequently, appellee was a stranger to the suit. It follows that the trial judge did not err in refusing to allow appellant to file its supplemental bill.

The decision by this court in Carson Investment Co. v. Anaconda Copper Mining Co., 26 F. (2d) 651, 657, relied upon by appellant, is in accord with the decisions of the Supreme Court above cited. In that case we said: 'We agree with appellee in the contention that the judgment could not be relied upon as an estoppel merely because the Anaconda Copper Company contributed some money toward the defense of the American Smelting & Refining Company suit, gathering testimony for the defense; but that does not meet the broader proposition that if the Anaconda Company directed its counsel to confer with counsel for the American Smelting & Refining Company, and if such counsel participated

> in the preparation of the case for trial and in the trial of the issues, and if the Anaconda Company had the right to exercise joint control over the litigation, and did actually co-operate with the American Smelting & Refining Company in the trial and appellate courts * * * it became privy to the American Smelting & Refining Company suit.' "

Under the established decisions of this court and the Supreme Court of the State of California, appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps are not in privity with Capitol. *Boulter v. Commercial Standard Ins. Co.,* 175 F.2d 763 (9th Cir. 1949), was an action by husband and wife against an insurance company to recover on a judgment which they had previously recovered against the owner and driver of a truck which had collided with their automobile and injured them. The insurance company defended on the ground that the accident was not covered by the provisions of the policy and that they had obtained a default judgment against the owner and driver of the truck declaring that the truck was not covered by the policy at the time of the accident. The district court in the instant action denied the defense based on the default judgment but granted the insurance company's motion for judgment notwithstanding the verdict on other grounds. In reversing this action, Circuit Judge Pope, speaking for the court, stated (p. 768):

> "Finally, appellee argues that the court should have upheld its plea of res judicata in which it

set up its declaratory judgment. Notwithstanding the Boulters were never served in the declaratory judgment suit, it is asserted that they are bound by that judgment because, it is argued, they were in privity with Warner. The rights which the Boulters acquired under the policy became vested long prior to the institution of the suit for declaratory judgment. Under the law of California, which controls here, a privy is '* * * one who, *after rendition of the judgment,* has acquired an interest in the subject matter affected by the judgment through or under one of the parties.' (Emphasis ours.) Bernhard v. Bank of America, 19 Cal.2d 807, 122 P.2d 892, 894. This court has quoted Freeman on Judgments, Sec. 162, to the effect that 'no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit.' Norton v. San Jose Fruit Packing Co., 9 Cir., 83 F. 512, 514.

The court below properly disregarded the plea of res judicata."

In the instant action the only evidence on the question and the findings of the trial court (R. 121, 159, 162, 357 et seq. in 13840), show that prior to December 31, 1943, the assets of Capitol Chevrolet Company were distributed to its stockholders James A. Kenyon and Adams Service Co. and on that date the Certificate of Winding Up and Dissolution was executed (R. 357 et seq. in 13840). On May 31, 1943, the stockholders of Capitol Chevrolet Company had authorized its dissolution and agreed that upon the

transfer to them of its assets they would assume the liabilities of the corporation (R. 159, 162 in 13840). On February 16, 1944, the complaint of Defense Supplies Corporation was filed, and on May 8, 1944, the cross-claim of Lawrence against Capitol was filed (R. 3 in 13840). Appellants having acquired their interests and assumed the liabilities of Capitol prior to the commencement of both the claim of Defense Supplies Corporation and the cross-claim of Lawrence, they are clearly not in privity with Capitol.

It is equally clear that these appellants did not aid in the defense or participate and control the defense of Capitol in the trial of the claim of Defense Supplies Corporation, that being the only trial in which it can be asserted that any evidence was introduced to show that Capitol incurred some liability to Lawrence. Primarily, it should be emphasized that Lawrence did not plead or contend at any time during the trial that James A. Kenyon and Adams Service Co. defended on behalf of Capitol. In *Dillard v. McKnight,* 34 C. 2d 209, 209 P.2d 387, the facts of which have been previously stated, Justice Spence stated for the court (p. 217):

> "But the frailty of plaintiffs' position in this respect arises from their failure to urge the claim of res judicata until they moved unavailingly for a new trial herein, and at no time in the proceedings of the second trial did plaintiffs put in issue the question of the participation of defendants Bower and Thorley in the conduct of the prior litigation. Neither Bower nor Thorley nor the partnership was named as a party to the ac-

> tion as it was prosecuted through the first trial and culminated in a judgment against defendant Wilcox, and defendants Bower and Thorley in the second trial might have been able to prove that they did not participate in the conduct of the prior defense or agree to have their copartner Wilcox conduct it for them had plaintiffs attempted to prove that they did. The entire matter of such alleged participation and exercise of control would be a question of fact to be resolved from the evidence adduced thereon, and defendants Bower and Thorley would be entitled to have their day in court in challenge of such charge by plaintiffs. (See 4 Jones' Commentaries on Evidence (2d ed.) § 1810, p.3351 et seq.) Otherwise, to follow plaintiffs' theory, mere knowledge of one partner that his copartner is being sued on an alleged partnership transaction would be sufficient to render the first judgment res judicata on all issues litigated, if in the subsequent prosecution of the action against the later-served partner proof is made of the relationship he sustained to the party-defendant in the prior trial. Such an extension of the doctrine of res judicata cannot be reconciled with the requirements of due process as above discussed."

Although Lawrence took the deposition of F. Norman Phelps and Alice Phelps (R. 262 et seq., 295 et seq. in 13840) and were permitted to reopen their case at the trial of the cross-claims to cross-examine Mr. Kenyon, who was then present (R. 373-374 in 13840), there is absolutely no evidence that these appellants aided in or participated in or controlled the defense at the trial

of the claim of Defense Supplies Corporation. In fact there is no intimation of even the vaguest sort by counsel or in the evidence that these appellants participated in any trial in which evidence of Capitol's liability was adduced. Assuming that the record of that trial could be looked at to establish its admissibility and that it was offered for this purpose against these appellants, there is still no such evidence.

Adams Service Co., F. Norman Phelps and Alice Phelps are nowhere mentioned in the entire record. As to James A. Kenyon, the only thing that appears is that he was called as a witness under Rule 43(b) by the plaintiff. Part of his testimony is as follows (R. 200 in 11418):

"The Clerk: Will you state your name to the Court please.

A. James A. Kenyon.

Direct Examination

By Mr. Miller: [Attorney for Defense Supplies Corporation]

Q. Will you speak out loud, Mr. Kenyon; you are quite a ways away from us?

A. I will.

Q. Are you an officer of the Capitol Chevrolet Company, Mr. Kenyon?

A. I am the owner of the Capitol Chevrolet Company. It is not a corporation. We have no officers.

Q. You are the owner of the Capitol Chevrolet Company? A. Yes.

Mr. Getz: It was a corporation and was dissolved.

By Mr. Miller:

Q. Were you president of the company?

A. Yes. We did not dissolve until May 31."

To establish that these appellants are not in privity with Capitol, the above quoted testimony of James A. Kenyon was reintroduced by appellants at the trial of the cross-claims (R. 354-356 in 13840). The record at the trial of the cross-claims also shows that counsel for Lawrence was present in the courtroom at the time this statement was made (R. 354-356 in 13840). The law is clear that in such a situation James A. Kenyon is not bound by the proceedings on the trial of the claim of Defense Supplies Corporation.

In *Wilgus v. Germain,* 72 Fed. 773 (9th Cir. 1896), this court had before it an action for damages for the infringement of a patent. Plaintiff contended that the defendant Germain was estopped by the judgment in a prior action against a corporation in which Germain was a stockholder and at the trial of which action Germain was in court, was a witness and took a leading part. It was also contended that defendant Newton was estopped by a prior judgment in favor of plaintiff against a corporation in which Newton was a stockholder and its secretary and treasurer. In the trial of the previous action Newton had been present in court and had been a witness. The lower court rendered judgment for defendants and the plaintiff appealed. This court affirmed the judgment and in an opinion by Circuit Judge Gilbert held that the evidence was insufficient to show that

Germain and Newton had participated in the trial against the corporation (see 72 Fed. 773 at 775-776).

Similarly, the Supreme Court of California has held that an attorney who acquired title to land prior to the commencement of an action in the nature of a creditors' bill against his predecessors in interest was not estopped by the judgment in such action even though he was the attorney for his predecessors in interest and as such cross-examined the witnesses.

Lange v. Braynard, 104 Cal. 156, 37 Pac. 868 (1894).

Parenthetically it should be pointed out that no notice or opportunity to defend the action by Defense Supplies Corporation against Lawrence was given these appellants.

See:

Washington Gas Co. v. Dist. of Columbia, 161 U.S. 316 (1895);

Booth-Kelly Lumber Co. v. Southern Pacific Co., 183 F.2d 902 (9th Cir. 1950).

It is of no assistance to Lawrence that these appellants may have defended on behalf of Capitol the claim of Reconstruction Finance Corporation against Capitol in No. 30473. The judgment in No. 30473 in favor of Reconstruction Finance Corporation does not establish any liability by Capitol to Lawrence, and in fact Lawrence's cross-claim against Capitol in No. 30473 was dismissed by the lower court and judgment was granted for Capitol (R. 131-133 in 13840). Fur-

thermore, said judgment in favor of Reconstruction Finance Corporation is of no legal effect. On its face it shows that the cross-claims in No. 30473 were still pending at the time it was rendered (R. 81 et seq. in 13840). The record in No. 30473 further discloses that the claims of Reconstruction Finance Corporation against James A. Kenyon and Capitol Chevrolet Co. (not to be confused with Capital Chevrolet Company referred to herein as "Capitol") are still pending (R. 43, 81 et seq. in 13840). Therefore, the judgment in favor of Reconstruction Finance Corporation is not final but is subject to revision at any time (Rule 54(b), F.R.C.P.).

The foregoing authorities establish that these appellants are not bound by the judgment in favor of Lawrence against Capitol and also establish, for the same reasons, that these appellants could not be bound by the transcript of testimony and exhibits adduced at the trial of the complaint of Defense Supplies Corporation, although, as previously pointed out, such evidence has never been offered or adduced as to these appellants.

B. THE COURT ERRED IN HOLDING THAT THE JUDGMENT IN FAVOR OF LAWRENCE AGAINST CAPITOL IN NO. 23171 WAS BINDING UPON THE ABOVE-NAMED APPELLANTS BECAUSE SAID JUDGMENT WAS RENDERED SUBSEQUENT TO THE TRIAL OF THIS ACTION AND SAID JUDGMENT MAY NOT EVEN NOW BE FINAL.

Assuming, arguendo, that the judgment in favor of Lawrence against Capitol had been offered against appellants, and assuming, arguendo, that they are in

privity with Capitol, the judgment is still not binding on them because it was not final at the time of trial. In Action No. 23171 there are cross-claims of Lawrence against Clyde W. Henry and Constantine Parella still pending (R. 3, 4 in 13840). Also there has been no adjudication of the cross-claims of Capitol in Action No. 23171 against Henry and Parella (R. 3, 4 in 13840). Clearly at the time of the trial of the cross-claims there had been no determination under Rule 54(b), Federal Rules of Civil Procedure, that there was no just reason for delay in entering the judgment in favor of Lawrence against Capitol in No. 23171 and directing its entry. Therefore, that judgment was not final but was subject to revision at any time. The Supreme Court of the United States has ruled that a judgment which is not final cannot be res judicata or an estoppel. In *Merriam v. Saalfield,* 241 U.S. 22 (1916), the court had before it an action for unfair competition in the business of publishing and selling dictionaries. The action was originally commenced against Saalfield who duly appeared and defended. The trial court dismissed the complaint but the Court of Appeals reversed and remanded the case for an injunction and an accounting. The district court made a decree in accordance with the mandate and an order for reference for the accounting. Thereafter a supplemental bill was filed charging that one Ogilvie had from the beginning actively conducted, controlled and directed the defense of the suit, having selected, retained and paid the solicitors and counsel for Saalfield

and that Ogilvie was the proprietor of the dictionaries involved in the suit. Ogilvie was served with process and a final decree was entered against him. Thereafter, however, Ogilvie appeared specially and successfully moved to quash the service of the subpoena issued against him and to set aside all proceedings based thereon. The trial court also denied a petition filed by the complainant for enforcement of the final decree against Ogilvie. The complainant appealed and the Supreme Court affirmed the action of the trial court on the grounds that Ogilvie could not be bound by the decree of the district court made after remand and that the court had no jurisdiction of the claim against Ogilvie. On the first ground, Justice Pitney stated for the unanimous court (pp. 28-29):

> "In so holding, the court applied the doctrine that has been laid down in a number of cases, that a third party does not become bound by a decree because of his participation in the defense unless his conduct in that regard was open and avowed or otherwise known to the opposite party, so that the latter would have been concluded by an adverse judgment. See *Andrews v. National Pipe Works,* 76 Fed. Rep. 166, 173; *Lane v. Welds,* 99 Fed. Rep. 286, 288. We need not consider the soundness of the doctrine, for appellant does not question it, insisting only that it is not applicable here because Ogilvie's control of the defense made in Saalfield's name became known to appellant during the progress of the suit, and before final decree; it being contended that the decree of September 11, 1912, was interlocutory and not final.

> But it is familiar law that only a final judgment is *res judicata* as between the parties. And it is evident that a decree cannot be *res judicata* as against a third party participating in the defense unless it is so far final as to be *res judicata* against the defendant himself. Hence, if the decree of September 11 was not final as between appellant and Saalfield, it cannot be *res judicata* as against Ogilvie; and thus the fundamental ground for proceeding against the latter by supplemental bill with substituted service of process disappears. This sufficiently shows the weakness of appellant's position, which, upon analysis, is found to be this: that upon the theory that Ogilvie would be estopped by a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles."

Were there no other points involved in this appeal, this holding in the *Merriam* case would require the judgment appealed from to be reversed.

C. CONSOLIDATION COULD NOT UNDER THE FEDERAL PRACTICE SUPPLY THE DEFICIENCIES IN PROOF OF PLAINTIFF'S CASE AGAINST THESE APPELLANTS.

Actions No. 23171 and No. 30473 were, on motion of Lawrence, consolidated for trial. The Order of Consolidation reads as follows (R. 18 in 13840):

> "Pursuant to Rule 42(a) of Federal Rules of Civil Procedure, and in confirmation of minute

order heretofore made and entered on January 9, 1952, it is hereby ORDERED that the above-captioned actions be consolidated for trial on March 5, 1952.

Dated: March 4, 1952.

Louis E. Goodman
Judge of the United States
District Court"

It has been decided that the legal effect of such an order in the federal courts is not a merger of the actions consolidated. In *Johnson v. Manhattan Ry. Co.,* 289 U.S. 479 (1933), Justice Van Devanter, speaking for the court, stated (pp. 496-497):

> "The District Judge, as shown in his opinion, was in doubt whether the attack was direct or collateral, but conceived that the doubt could be removed and the attack made direct by ordering a consolidation of the two suits, which he did on his own motion over objections by the parties to the American Brake Shoe Company suit. The order of consolidation has since been reversed by the Circuit Court of Appeals; but, quite apart from the reversal, the consolidation did not alter the nature of the attack. Under the statute, 28 U.S.C., § 734, consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."

This case has been followed consistently under the Federal Rules of Civil Procedure.

See:

Greenberg v. Giannini, 140 F. 2d 550 at 552 (2d Cir. 1950);

National Nut Co. v. SuSu Nut Co., 61 F. Supp. 86 (N.D.Ill. 1945);

United States v. Bregler, 3 F.R.D. 378 at 379 (E.D.N.Y. 1944).

In *Greenberg v. Giannini,* supra, Circuit Judge Learned Hand stated (p. 552):

> "The first question is of the validity of the service upon the Transamerica Corporation; it must be decided as though the two actions had remained unconsolidated, because the order did not merge them—contrary to the apparent assumption of both parties—but was only a convenience, accomplishing no more than to obviate the duplication of papers and the like. Johnson v. Manhattan R. Co., 289 U.S. 479, 496, 497, 53 S.Ct. 721, 77 L.Ed. 1331."

Evidence in one case becomes evidence in another case only if the parties so agree or the court so orders prior to trial.

National Nut Co. v. SuSu Nut Co., 61 F. Supp. 86 (N.D.Ill. 1945).

There is no agreement or order to such effect in the instant case. Thus, even in the ordinary situation, evidence in one consolidated case does not by merger become evidence in the other. There is therefore no conceivable ground in the instant situation upon which the evidence introduced at the trial of the complaint

of Defense Supplies Corporation (the only evidence offered in either of the cases now on appeal to show Capitol's liability to Lawrence) could become evidence in the second action, No. 30473; that evidence was introduced not only long before the second action was filed but seven years before the order for consolidation was made. Assuming, arguendo, that the effect of consolidation was to merge the two actions, that evidence still would not be admissible and could not be considered as to these appellants because they were not parties or in privity with parties to the action at the time the evidence was introduced.

From an evidentiary standpoint the effect of consolidation in the instant case is conclusively dictated by circumstances previously pointed out. At the trial both the court and counsel for Lawrence limited the evidence of Capitol's liability to Lawrence to the cross-claim in the first action, No. 23171, and led counsel for appellants to believe it was so limited (R. 317, 322-323, 339-340 in 13840). In fact, appellants, as cross-defendants in the second action, were not even permitted to file their motions to dismiss, and F. Norman Phelps and Alice Phelps were not permitted to file their answers until after the evidence had been offered in No. 23171 (R. 322-323).

From the foregoing analysis arise three independent and separate reasons why the judgment against these appellants must be reversed:

1. No evidence was offered or admitted against appellants to show a liability of Capitol to Lawrence.

2. Under the settled law of this court and the decisions of the State of California, appellants cannot be bound by the judgment or evidence against Capitol.

3. Under the decisions of the Supreme Court of the United States the judgment against Capitol, not being final, cannot be *res judicata* against appellants.

The sustaining by this court of any one of these grounds results in a complete failure by Lawrence to establish a claim against any of these appellants.

III. THE COURT ERRED IN FAILING TO FIND THAT LAWRENCE WAREHOUSE COMPANY WAS EQUALLY, JOINTLY AND CONTRIBUTORILY NEGLIGENT OR NEGLIGENT IN ANY OF SAID WAYS WITH CAPITOL CHEVROLET COMPANY, OR WAS SOLELY NEGLIGENT IN CAUSING THE DAMAGE FOR WHICH JUDGMENT WAS RENDERED IN FAVOR OF DEFENSE SUPPLIES CORPORATION IN CIVIL ACTION NO. 23171, AND IN FINDING TO THE CONTRARY (FINDINGS, NOS. VI, VII, XIII, XVII, XVIII, XIX, XXII AND XXIII).

The previous discussion established that Lawrence failed to prove any basis for a claim of relief against appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps. That alone requires the judgment appealed from to be reversed and that judgment be rendered in favor of the appellants. Appellants, however, established on evidence, which is uncontroverted and which Lawrence did not even seek to controvert, a valid and sufficient defense to Lawrence's claim. Under the law of Cali-

fornia, the rule of decision in the instant action, there can be no contribution between joint tort-feasors; the California Supreme Court has expressly rejected the doctrine that one "actively negligent" can recover from one "passively negligent."

Dow v. Sunset Tel. & Tel. Co., 162 Cal. 136 at 138-139, 140, 121 Pac. 379 (1912).

This court has stated that unless an indemnitor is an insurance company, an indemnity agreement will not be construed to cover negligent acts of the one indemnified.

United States v. Wallace, 18 F. 2d 20 (9th Cir. 1927).

In fact the indemnity agreement would not preclude Capitol from indemnification by Lawrence for Lawrence's negligent acts exposing Capitol to liability.

Washington & Berkeley B. Co. v. Pennsylvania S. Co., 215 Fed. 32 (4th Cir. 1914).

Thus, even assuming that the indemnification agreement executed when Capitol stored the tires and tubes in its own warehouses applied to the storage in the Ice Palace (of which there is no evidence), that agreement would not permit Lawrence to recover from Capitol for damages caused in part by Lawrence's own negligent acts. Nor in such case would the principal and agent relationship entitle Lawrence to indemnification by Capitol.

Green v. Southern Pacific Co., 53 C.A. 194 at 201, 203, 199 Pac. 1059 (1921), hearing in Supreme Court denied;

1 Mechem, Agency (2d Ed. 1914), Sec. 1287.

Furthermore, the agent is entitled to indemnification from the principal for negligent acts of the agent directed by the principal.

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908);

Horrabin v. City of Des Moines, 198 Iowa 549, 199 N.W. 988 (1924);

1 Mechem, Agency (2d Ed. 1914), Sec. 1603.

Appellants contend that the only evidence involved in the cross-claims against these appellants shows that Lawrence's independent active negligence caused the loss for which recovery is sought.

A. LAWRENCE, HAVING PARTICIPATED IN THE TRIAL OF THE COMPLAINT OF DEFENSE SUPPLIES CORPORATION IN NO. 23171, IS BOUND BY THE DETERMINATION THEREIN THAT ITS ACTS JOINED AND CONCURRED IN CAUSING THE DAMAGE TO THE TIRES AND TUBES OF DEFENSE SUPPLIES CORPORATION.

At the trial of the cross-claims appellants introduced, without objection by Lawrence, the complaint of Defense Supplies Corporation, the answer of Lawrence and its cross-claim against Capitol and others, the answer of Capitol and its cross-claim against others, the findings of fact and conclusions of law and the judgment, all in Action No. 23171 (Exhibits A, B, C, D, E, R. 347-354 in 13840). Although these appellants were not parties to Action No. 23171 and not bound by the record in that action, that record was admissible and conclusive against Lawrence because Lawrence was a party to that action.

Bernhard v. Bank of America, 19 C.2d 807 at 811-813, 122 P. 2d 892 (1942).

The operative portion of the judgment in No. 23171 reads as follows (R. 347-348 in 13840):

> "Now, Therefore, It is Ordered, Adjudged and Decreed that Defense Supplies Corporation, the plaintiff herein, do have and recover from defendants Lawrence Warehouse Company, a corporation, Capitol Chevrolet Company, a corporation and V. J. McGrew, jointly and severally, the sum of $41,975.15 together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of $196.55."

A judgment such as this establishes that Lawrence and Capitol were joint tort-feasors not entitled to indemnity under the law of California.

In *Adams v. White Bus Line,* 184 Cal. 710, 195 Pac. 389 (1921), the Supreme Court of California had before it an action in which the plaintiff, a passenger upon a stage of the defendant White Bus Line, suffered personal injuries as a result of a collision between the stage and an automobile driven by the other defendant, Stiles. The defendants were both joined in the action as being jointly and severally liable for the accident, and the court so found. Thereafter the indemnity insurer of the bus line paid the amount of the judgment to the plaintiff, and an assignment of the judgment in the name of an employee of the White Bus Line was made. Defendant Stiles thereupon applied to the court for an order directing the entry of the satisfaction of the judgment on the ground that the payment to the indemnity company satisfied the judgment as to both defendants. The

court directed such entry of satisfaction and defendant White Bus Line appealed. In affirming the action of the trial court, the Supreme Court first held that the insurer stood in the position of the bus line and that the assignment could not avoid the doctrine that there is no right of contribution between joint tort-feasors. Justice Sloane went on to state for the court (p. 713):

> "The great weight of authority, however, is against the right of contribution between defendants whose concurrent negligence has made them jointly liable in damages. The rule applicable to this case is stated in *Harbeck v. Vanderbilt,* 20 N.Y. 395: 'Where one of several defendants against whom there is a joint judgment pays to the other party the entire sum due, the judgment becomes extinguished, whatever may be the intention of the parties to the transaction. It is not in their power, by any arrangement between them, to keep the judgment on foot for the benefit of the party making the payment. If, therefore, in such a case, a party take an assignment to himself, or, unless under special circumstances, to a third person for his own benefit, the assignment is void and the judgment is satisfied.'
>
> Where one of several joint wrongdoers pays a judgment obtained against them all, he acquires no right of contribution by taking an assignment of the judgment in the name of a man of straw."

The holding in this case was followed in *Smith v. Fall River J. U. High School Dist.,* 1 C.2d 331, 34 P.2d 994 (1934); see also, *Benson v. Southern Pacific Co.,* 177 Cal. 777, 171 Pac. 948 (1918).

A joint judgment such as that rendered in the instant case has also been held to preclude indemnification in jurisdictions which otherwise permit one passively negligent to be indemnified by one actively negligent.

Maryland Casualty Co. v. Frederick Co., 142 Ohio State 605, 53 N.E.2d 795 (1944).

Findings Nos. V, VI and VII in No. 23171 read as follows (R. 80-81 in 11418):

"V.

On April 9, 1943, defendants Lawrence Warehouse Company and Capitol Chevrolet Company failed and omitted to exercise reasonable care and diligence for the protection and preservation of said goods so deposited and stored by plaintiff in this, that said defendants negligently permitted the use of said torch on said premises and negligently failed and omitted to see that it was used in a careful manner, and to provide adequate protection for said premises and said goods against the use of said torch, and maintained said premises and said goods in a negligent and careless manner so as to permit them to become ignited and destroyed by fire. By reason of such negligence and carelessness said premises and plaintiff's said goods were consumed and totally destroyed by fire."

"VI.

The negligence of defendants V. J. McGrew, Lawrence Warehouse Company, and Capitol Chevrolet Company concurred and joined together to destroy plaintiff's goods, as aforesaid."

"VII.

By reason of said negligence acts of defendants V. J. McGrew, Lawrence Warehouse Company and Capitol Chevrolet Company, plaintiff has been damaged in the sum of $41,975.15."

In the brief of appellant Capitol Chevrolet Company (pp. 52, 53, 54) the significance of these findings under the law of California is set forth; such findings preclude indemnification.

Salter v. Lombardi, 116 Cal. App. 602, 3 P.2d 38 (1931), hearing in Supreme Court denied;

Bradley v. Rosenthal, 154 Cal. 420 at 423, 97 Pac. 875 (1908).

It is of additional significance that the complaint in No. 23171 does not aver Lawrence to be liable on a theory of *respondeat superior* and such is not the basis of liability set forth in the findings, conclusions and judgment.

IV. LAWRENCE WAREHOUSE COMPANY EXPRESSLY DIRECTED CAPITOL CHEVROLET COMPANY TO STORE THE TIRES AND TUBES OF DEFENSE SUPPLIES CORPORATION IN THE ICE PALACE KNOWING OF ITS FIRE HAZARDS AND UNDERTOOK TO PROVIDE AND DID PROVIDE WATCHMEN FOR THE ICE PALACE WHOSE DUTY IT WAS TO PROTECT THE TIRES AND TUBES AND WHO HAD ACTUAL KNOWLEDGE OF THE ACTS OF V. J. McGREW WHICH CAUSED THE DAMAGE TO THE TIRES AND TUBES.

The only evidence offered at the trial of the cross-claims to show whose negligence caused the loss of tires and tubes was that offered by these appellants.

This evidence is concise, unambiguous and determinative of this appeal. The following portion of the verified answer of Lawrence in No. 23171 was read into the record at the trial (R. 351-352 in 13840):

> "Incident to said storage and the rental of said premises, plaintiff directed that this defendant [Lawrence] employ watchmen for the said premises and for the tires and tubes therein stored, and accordingly, this defendant employed and regularly maintained on said premises day and night watchmen of the agency selected and paid for by the said plaintiff."

The remainder of the evidence on this question consists of the testimony of appellant James A. Kenyon. It shows conclusively that:

1. Pursuant to the Agency Agreement Capitol stored tires and tubes in eleven different warehouses in Sacramento belonging to it (R. 361-362 in 13840);

2. Thereafter Lawrence directed Capitol to consolidate the storage of tires and tubes in the Ice Palace (R. 363-366 in 13840);

3. Capitol did not desire to store the tires and tubes in the Ice Palace (R. 363 in 13840);

4. Lawrence inspected the Ice Palace and was aware of its fire hazards when it directed Capitol to store the tires and tubes there (R. 368-372 in 13840);

5. Prior to the storage of the tires and tubes in the Ice Palace Lawrence undertook to provide

and subsequently maintained watchmen for the Ice Palace (R. 366 in 13840).

This testimony and the judicial admission in Lawrence's pleading were the only evidence offered by either party at the trial of the cross-claims in No. 30473. It is not contradicted, and counsel for Lawrence did not even cross-examine Mr. Kenyon on these subjects or seek to impeach him (R. 373 in 13840). It is clear, therefore, that under the law of California and the law generally these appellants established an absolute defense to the claim of Lawrence. This defense was not contradicted by any evidence even though Lawrence was permitted to reopen its case (R. 374 et seq. in 13840), nor did Lawrence seek to offer evidence on this point when it moved to reopen the case after the original order for judgment had been made (R. 171 et seq. in 13840). Consequently, the judgment of the trial court must be reversed and the action remanded with directions to enter judgment for these appellants.

V. THE COURT ERRED IN FAILING TO HOLD THAT THE CROSS-CLAIMS OF LAWRENCE WAREHOUSE COMPANY ARE BARRED BY THE STATUTE OF LIMITATIONS (C.C.P. SEC. 337(1)).

Generally no cause of action accrues for breach of an obligation to indemnify against damages or loss until payment has been made by the indemnitee. The cause of action may accrue earlier as in other obliga-

tions where there is an anticipatory breach by repudiation.

Wahl v. Cunningham, 320 Mo. 57, 6 S.W. 2d 576 at 580 (1928).

Similarly it has been held that the effect of Rules 13(g) and 14(a) of the Federal Rules of Civil Procedure permitting cross-claims against one who is or may be liable to the cross-claimant, is to accelerate the accrual of causes of action for indemnification where such procedures are utilized.

Greenleaf v. Huntingdon & B. T. M. R. & Coal Co., 3 F.R.D. 24 (E.D. Pa. 1942).

Admittedly under either of these grounds the cause of action is accelerated only at the option of the indemnitee, but such option is exercised, however, as in the instant action, by commencing an action.

Crown Prod. Co. v. Cal. Food Etc. Corp., 77 C.A.2d 543 at 551, 175 P.2d 861 (1947).

Clearly Capitol repudiated any liability to Lawrence in its answer to Lawrence's cross-claim filed May 18, 1944 (Exhibits D, E; R. 352-354 in 13840). Thus the cross-claims in No. 30473 on the same cause of action are barred because they were filed more than four years after May 18, 1944.

California Code of Civil Procedure, Sec. 337(1).

There is no question of concealment of the possible liability of the transferees because Lawrence was placed on notice of the transfer at the trial of the

deny that its own negligence contributed to the loss for which it seeks recovery. Under the law generally the evidence, consisting of the judicial admissions of Lawrence and the uncontradicted testimony of James A. Kenyon, requires that Lawrence be denied indemnification because its own negligence contributed to its loss. No evidence was offered or, if offered, could have been admitted, against these appellants to show that Capitol incurred some liability to Lawrence. Therefore, the judgment in No. 30473 must be reversed with directions to enter judgment for appellants James A. Kenyon, Adams Service Co., F. Norman Phelps and Alice Phelps.

Dated, San Francisco, California,
September 22, 1953.

Respectfully submitted,
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